MSIG Insurance (M) Bhd v Md Aznol Hafiz bin Amir & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-429–08 OF 2018
NANTHA BALAN J
20 FEBRUARY 2019

Insurance — Motor insurance — Liability — Plaintiff applied for declaration that insurance policy issued by plaintiff to second defendant void and/or unenforceable — Whether deceased died whilst being carried in or on insured motor lorry by reason of or in pursuance of deceased's contract of employment — Whether deceased could be said to be within scope of passenger cover under insurance of policy — Whether plaintiff liable — Road Transport Act 1987 s 96(3)

On 19 August 2016 one Abdul Mirashaerizeam bin Abdul Razak ('the deceased') drove motor lorry WWM 3921 which was owned by his employer Gold Cold Transport Sdn Bhd ('GCT'). Whilst the deceased was driving in the vicinity of Rawang, it skidded and as a result the motor lorry was damaged and could not be driven. The deceased was instructed by someone from his office to wait at the location of the accident as arrangements were being made for the deceased to be picked up or rescued. The first defendant ('D1') who was the driver of motor lorry WSV 3890 was instructed by the second defendant ('D2') who were the registered owners of the said motor lorry to fetch or rescue the deceased from the location of the accident in Rawang and to take him back to the GCT office. GCT was a sister company of D2. The deceased was duly picked up by D1. At about 1.50am, the motor lorry driven by D1 collided into the rear offside of a motor lorry BJK 1042 ('the accident'). The deceased who was sitting in the front as a passenger sustained serious injuries and subsequently died. The third to sixth defendants ('the dependants') filed a claim against the drivers and owners of motor lorry WSV 3890 and motor lorry BJK 1042, respectively for loss of dependency, funeral expenses, bereavement and special damages ('Suit 738'). The plaintiff applied by way of an originating summons under s 96(3) of the Road Transport Act 1987 for a declaration that the motor vehicle policy of insurance issued by the plaintiff ('the policy') for motor lorry WSV 3890 ('the insured motor lorry') was void and/or unenforceable in respect of any judgment that may be obtained by the dependants in Suit 738. The issues for determination were: (a) whether the deceased died whilst he was being carried in or on the insured motor lorry by reason of or in pursuant of the deceased's contract of employment; and (b) whether the deceased, being a passenger with no employment nexus either with the second defendant, or its authorised driver the first defendant, could be said to be within the scope of passenger cover as per section 6(c) of the policy.

Held, dismissing the originating summons:

(1) The deceased was travelling as a passenger in the insured motor lorry and the journey that he took whilst as a passenger in the insured motor lorry was in the course of his employment, wherein he was being taken back to the office. The deceased was still on duty whilst he was travelling as a passenger in the insured motor lorry. The deceased was therefore travelling in the course of his employment or more particularly travelling as a passenger, 'by reason of or in pursuance of his contract of employment, albeit, as an injured passenger in the insured motor lorry, which was not owned by his own employer, GCT. Since the deceased was travelling back to his office in the insured motor lorry as per instructions of his employer GCT, the fatal injuries which he sustained in the accident, were sustained by reason of or in pursuance of his contract of employment with GCT (see paras 34–37).

(2) If the plaintiff had intended that the words 'his/her employer' should only referred to the authorised driver's employer, then that should had been clearly and unambiguously stated in section 6(c) of the policy instead of leaving it to be open ended and ambiguous wherein those critical words lent themselves to at least two possible interpretations. The interpretation that was advanced by the dependants, ie 'his/her employer' could be a reference to the passenger's own employer, was quite a plausible and reasonable interpretation of the policy wording (see para 56).

(3) The reference to 'he/she' in the opening of the sentence which began with 'unless' in the policy was a reference to the passenger and no one else and as such when it was tied up to the words, 'his/her' in the middle and at the end of that sentence, the meaning became crystal clear that 'his/her' in both places of that section was a reference to the passenger. The deceased fell within the ambit of the cover and as such passenger cover for the deceased was accordingly established. Hence, section 6(c) of the policy was interpreted as providing passenger cover for the deceased (see paras 58–59).

[Bahasa Malaysia summary

Pada 19 Ogos 2016 seorang Abdul Mirashaerizeam bin Abdul Razak ('si mati') memandu lori WWM 3921 yang dimiliki oleh majikannya Gold Cold Transport Sdn Bhd ('GCT'). Ketika si mati sedang memandu di sekitar Rawang, ia tergelincir dan akibatnya lori rosak dan tidak dapat dipandu. Si mati telah diarahkan oleh seseorang dari pejabatnya untuk menunggu di lokasi kemalangan itu apabila perkiraan dibuat untuk si mati diambil atau diselamatkan. Defendan pertama ('D1') yang merupakan pemandu lori WSV 3890 diarahkan oleh defendan kedua ('D2') yang merupakan pemilik berdaftar lori tersebut untuk mengambil atau menyelamatkan si mati dari

lokasi kemalangan di Rawang dan membawanya kembali ke pejabat GCT. GCT adalah sebuah syarikat bersekutu D2. Si mati telah dijemput oleh D1. Pada kira-kira pukul 1.50 pagi, lori yang dipandu oleh D1 bertembung dengan belakang lori BJK 1042 ('kemalangan'). Si mati yang duduk di hadapan sebagai penumpang mengalami kecederaan serius dan kemudian meninggal dunia. Defendan ketiga dan keenam ('tanggungan') memfailkan tuntutan terhadap pemandu dan pemilik kenderaan lori WSV 3890 dan lori motor BJK 1042, masing-masing kerana kehilangan kebergantungan, perbelanjaan pengebumian, perkabungan dan gantirugi khas ('Guaman 738'). Plaintif memohon melalui saman pemula di bawah s 96(3) Akta Pengangkutan Jalan 1987 untuk perisytiharan bahawa polisi insurans kenderaan bermotor yang dikeluarkan oleh plaintif ('polisi') bagi lori WSV 3890 ('lori yang diinsuranskan') adalah tidak sah dan/atau tidak boleh dikuatkuasakan berkenaan dengan apa-apa penghakiman yang boleh diperoleh oleh tanggungan dalam Guaman 738. Isu-isu untuk penentuan adalah: (a) sama ada si mati meninggal dunia semasa dia sedang dibawa di dalam atau di atas lori yang diinsuranskan oleh sebab atau mengikut kontrak pekerjaan si mati; dan (b) sama ada si mati, sebagai seorang penumpang tanpa pertalian pekerjaan sama ada dengan defendan kedua, atau pemandu yang diberi kuasa oleh defendan pertama, boleh dikatakan berada di dalam skop perlindungan penumpang mengikut seksyen 6(c) polisi.

Diputuskan, menolak saman pemula:

(1) Si mati sedang dalam perjalanan sebagai penumpang lori yang diinsuranskan dan perjalanan yang diambilnya sebagai penumpang lori yang diinsuranskan adalah dalam tempoh pekerjaannya, di mana dia dibawa kembali ke pejabat. Si mati masih bertugas ketika dia sedang dalam perjalanan sebagai penumpang lori yang diinsuranskan. Oleh itu, si mati sedang dalam tempoh pekerjaannya atau secara khususnya dalam perjalanan sebagai penumpang, 'oleh sebab atau menurut kontrak pekerjaannya', walaupun, sebagai penumpang yang cedera dalam lori yang diinsuranskan, yang tidak dimiliki oleh majikannya sendiri, GCT. Memandangkan si mati dalam perjalanan ke pejabatnya dengan lori yang diinsuranskan mengikut arahan majikannya GCT, kecederaan maut yang dialami dalam kemalangan itu, dikekalkan oleh sebab atau menurut kontrak pekerjaannya dengan GCT (lihat perenggan 34–37).

(2) Jika plaintif memaksudkan bahawa perkataan 'majikannya' hanya boleh dirujuk kepada majikan pemandu yang diberi kuasa, maka ia mestilah jelas dan nyata dinyatakan dalam seksyen 6(c) polisi dan bukannya meninggalkannya terbuka dan samar-samar di mana kata-kata kritikal itu meminjamkan diri kepada sekurang-kurangnya dua tafsiran yang berkemungkinan. Tafsiran yang dibangkitkan oleh tanggungan, iaitu 'majikannya' boleh merujuk kepada majikan penumpang sendiri, adalah

tafsiran yang munasabah dan wajar mengenai perkataan polisi itu (lihat perenggan 56).

(3) Rujukan kepada 'beliau' dalam pembukaan ayat yang bermula dengan 'kecuali' dalam polisi itu adalah rujukan kepada penumpang dan tidak ada orang lain dan oleh itu apabila ia terikat dengan kata-kata, 'beliau' di tengah dan akhir ayat itu, makna menjadi jelas bahawa 'beliau' di kedua-dua tempat itu adalah rujukan kepada penumpang. Si mati jatuh di dalam skop perlindungan dan oleh itu perlindungan penumpang sedemikian untuk si mati telah dibuktikan dengan sewajarnya. Oleh itu, seksyen 6(c) polisi ditafsirkan sebagai menyediakan perlindungan penumpang kepada si mati (lihat perenggan 58–59).]

Cases referred to

Lonpac Insurance Bhd v Ridzuan bin Rahim (Civil Appeal No 12 BNCVC-18–03 of 2015) (unreported), HC (refd)

The People' s Insurance Co (M) Bhd v Ting Tiew Kiong [2007] 5 MLJ 624; [2007] 5 CLJ 225, CA (folld)

Union Insurance Malaysia Sdn Bhd v Chan You Young [1996] 2 MLJ 118; [1995] 4 CLJ 92, HC (folld)

Vandyke v Fender (Sun Insurance Office Ltd, third party) [1970] 2 QB 292, CA (folld)

Legislation referred to

Road Transport Act 1987 s 91(1), (1)(aa), (1)(bb), 96(3)

Samreet Singh Sagoo (Lovelace & Hastings) for the plaintiff.

Aisha Jothilingam (Ganesalingam Vijayaratnam & Aisha Jothilingam) for the third, fourth, fifth and sixth defendants.

Rueben Netto (JS Naicker with him) (Naicker & Assoc) for the seventh, eight and ninth defendants.

Nantha Balan J:

INTRODUCTION

[1] In this case, the insurers of a motor lorry are seeking to avoid liability for the death of a passenger who was travelling in the insured motor lorry when it met with an accident. It is contended that based on the policy wordings of the policy of insurance, the deceased passenger did not fall within the ambit of passenger cover as per section 6(c) of part B of the policy.

[2] On 19 August 2016 at about 1.50am, motor lorry No WSV 3890 was involved in an accident with motor lorry No BJK 1042 at KM 31.1 KESAS Highway ('the accident'). The first defendant ('D1') was the driver of motor

lorry WSV 3890. The second defendant ('D2') are the registered owners of the said motor lorry. The plaintiff is the insurer of motor lorry WSV 3890. At all material times, one Encik Abdul Mirashaerizeam bin Abdul Razak ('the deceased') (who was also a lorry driver) was travelling in the motor lorry WSV 3890 but as a 'passenger'. The deceased sustained serious injuries in the accident. He subsequently died as a result of injuries sustained in the accident. His dependants filed a claim against the drivers and owners of motor lorry WSV 3890 and motor lorry BJK 1042, respectively for loss of dependency, funeral expenses, bereavement and special damages.

THE APPLICATION — ORIGINATING SUMMONS

[3] This is an application by way of an originating summons ('the OS') under s 96(3) of the Road Transport Act 1987 for a declaration that the motor vehicle policy of insurance issued by the plaintiff via policy No KL–86473799 CV ('the policy') for motor lorry WSV 3890 ('the insured motor lorry') which was registered in the name of D2 is void and/or unenforceable in respect of any judgment that may be obtained by the third to sixth defendants ('the dependants') in Shah Alam Sessions Court Suit No BA-A53KJ-738–12 of 2017 ('Suit 738') which they had filed as a result of the accident which occurred on 19 August 2016.

EMPLOYMENT WITHIN THE GOLD COLD GROUP

[4] At the material time, the insured motor lorry was driven by D1. D1 was employed as a lorry driver by D2. D1 and D2 have been duly served with the cause papers for the OS, but they have not responded to, nor taken part in these proceedings.

[5] It is not in dispute that the deceased was not an employee of D1 or D2 at the material time. The deceased was in fact an employee of D2's sister company, Gold Cold Transport Sdn Bhd ('GCT'). D2 and GCT are subsidiaries of Gold Cold Holdings Sdn Bhd ('Gold Cold Group').

[6] According to the evidence of the Human Resource Executive for the Gold Cold Group, Puan Norbaizura bt Puasa ('Puan Nor') who testified in Suit 738, the deceased was an employee of GCT, which is a sister company of D2. Puan Nor said that it is common for employees of one company within the Gold Cold Group of companies to perform jobs for another company within the group.

THE FIRST ACCIDENT (RAWANG)

[7] Puan Nor said that on that particular day, the deceased drove motor lorry No WWM 3921 which was owned by his own employer GCT. Whilst the deceased was driving motor lorry WWM 3921 in the vicinity of Rawang, it skidded ('terbabas' — p 76, encl 2) and as a result the motor lorry was damaged and could not be driven. This was the deceased's first accident on that day.

[8] The deceased sustained minor injuries in the first accident. He was stranded. He contacted his office. The deceased was 'instructed' by someone from the office to wait at the location of the accident as arrangements were being made for the deceased to be 'picked up' or 'rescued'. Not much else is known about the accident involving motor lorry No WWM 3921. But, the details regarding the first accident are not important in so far as the present issue is concerned.

THE SECOND (FATAL) ACCIDENT (KESAS HIGHWAY)

[9] I turn now to the effort to rescue the deceased from the scene of the first accident and events leading up to the second accident which took place along the KESAS Highway. D1 happened to be in the Rawang area at the material time. As per the standard operating procedure or practice within the Gold Cold Group, any lorry from the group which is within the vicinity would render assistance and pick up a driver who is stranded. Thus, D1 was instructed by D2 to fetch (or rescue) the deceased from the location of the accident in Rawang and to take him back to the GCT office in Shah Alam. The deceased was duly picked up by D1.

[10] Whilst D1 was driving the insured motor lorry along the KESAS Highway, an unidentified vehicle swerved into the path of the insured motor lorry, and D1 was compelled to take evasive action. He swerved to the left of the road.

[11] D1 then spotted motor lorry No BJK 1042 which was 'parked stationary' along the highway. D1 quickly tried to swerve back to the right, but it was too late and the front nearside of the insured motor lorry collided into the rear offside of motor lorry No BJK 1042. The deceased who sitting in the front as a passenger took the brunt of the impact and sustained serious injuries.

[12] The seventh defendant ('D7') is the driver of motor lorry BJK 1042 and the eighth defendant ('D8') is the owner thereof. The ninth defendant ('D9') is the insurer of motor lorry BJK 1042. Hence, the deceased had the misfortune of being involved in two accidents in one day. Unfortunately, the deceased sustained serious injuries in the second accident and died as a result of those

injuries. In his police report dated 19 August 2016, D1 stated the following:

> PADA 19/08/2016 JAM LEBIH KURANG 1.50 PAGI SAYA MEMANDU M/LORI NOMBOR PENDAFTARAN WSV3890 JENIS HINO PERJALANAN DARIPADA BUKIT BERUNTUNG MENUJU KE PULAU INDAH KLANG MELALUI LEBUH RAYA KESAS. PADA KETIKA ITU SAYA MEMANDU DI LORONG SEBELAH KIRI DAN APABILA SAYA SAMPAI DI LEBIH KURANG KM 31.1 LEBUH RAYA KESAS, TIBA-TIBA SEBUAH M/KAR DARI LORONG SEBELAH KANAN TELAH MASUK KE LORONG TENGAH SECARA MENGEJUT. SAYA TELAH BERTINDAK MENGELAK KE SEBELAH KIRI DAN TIBA-TIBA SAYA DAPATI TERDAPAT SEBUAH M/LORI NOMBOR PENDAFTARAN BJK1042 JENIS NISSAN DIESEL YANG DILETAKKAN DI LORONG SEBELAH KIRI, SAYA TELAH MENGELAK SEMULA KE LORONG SEBELAH KANAN, TETAPI BAHAGIAN SISI HADAPAN SEBELAH KIRI M/LORI YANG SAYA PANDU TELAH TERLANGGAR PADA BAHAGIAN SISI BELAKANG SEBELAH SEBELAH KANAN M/LORI TERSEBUT. AKIBAT DARI KEMALANGAN ITU SAYA TIDAK MENGALAMI APA-APA KECEDERAAN, *MANAKALA PEMANDU KEDUA YANG BERADA DI DALAM M/LORI YANG SAYA PANDU NAMA ABDUL MIRASHEARIZEAM BIN ABDUL RAZAK NO. KP: 861124-30-5127 MENGALAMI KECEDERAANDAN KINI SEDANG DI RAWAT DI HOSPITAL KLANG AKIBAT DARI KEMALANGAN ITU* ...

THE INSURER'S POSITION VIS A VIS THE DECEASED

[13] In this OS, the plaintiff, as the insurers of the insured motor lorry, take the position that the deceased was a mere passenger in the insured motor lorry and that he was neither an employee of D2 (the insured) nor an employee of D1 who was travelling as a passenger in the course of or in pursuance of his employment.

[14] The plaintiff contends that the deceased was, as Puan Nor put it during her testimony in Suit 738, 'an injured person in the lorry'. This is seen from her response to the questions during cross-examination which are as follows,

SV:	Kedua, Dan itu adalah dalam urusan kerja?
NOR:	Dua-dua lori adalah urusan ... ada urusan kerja.
SV:	Ok tapi En Abdul ini, *semasa beliau sekarang berada dalam lori WSV, ya WSV, dia dibawa bukan dalam urusan kerja dia, tapi seorang yang sudah sakit sebab kemalangan di Rawang, Setuju?*
NOR:	Saya boleh katakana itu adalah *arahan majikan untuk bawa balik*.
SV:	*Ya, arahan majikan tapi semasa En Abdul duduk dalam motor lori, WSV dari Rawang ke Shah Alam, dia duduk dalam itu bukan untuk menjalankan pekerjaan dia, ya?*
NOR:	*Bukan. Sebagai penumpang sahaja.*

SV:	Dan sebagai seorang yang sudah sakit sebab ada kecederaan ringan.
NOR:	Ya.
SV:	I mean *he was an injured person in the lorry?*
NOR:	*Ya.*
SV:	Setuju?
NOR:	Setuju.
NS:	Sorry, could you repeat?
SV:	*He was an injured person*.
SV:	He was an injured person in the lorry.
NOR:	Tapi kecederaan yang sangat ringan. Dia sedar dan boleh bergerak lah.
SV:	*Ya tapi dia duduk lori itu bukan untuk urusan kerja.*
NOR:	*Ya.* (Emphasis added.)

[15] Although Puan Nor agreed with counsel suggestion during cross-examination that the deceased was not travelling in the insured motor lorry for the purposes of carrying out his work (*duduk dalam itu bukan untuk menjalankan pekerjaan dia*), it is nevertheless important to note that the deceased was not an ordinary person who was randomly picked up by D1 along the way.

[16] The deceased was in fact still on duty at the material time and was 'instructed' by his employer (GCT) to wait at the location of the accident as arrangements were being made to rescue the deceased and to take him to the office in Shah Alam. Of course, it is quite clear that the deceased was not travelling in the insured motor lorry as an employee of D1, nor was he doing anything in the insured motor lorry such as performing any work as an attendant or as D1's co-worker or anything else for that matter. The deceased was merely being ferried back to his employer's office in Shah Alam.

[17] The fact of the matter is that the deceased was an injured person who was travelling in a motor lorry which was owned by his employer's sister company, which had been sent to rescue the deceased from the scene of the first accident. And he died whilst he was a passenger in the insured motor lorry in the course of being 'transported' back to his office in Shah Alam.

[18] The plaintiff's legal position is quite succinctly stated their solicitor's letter dated 23 August 2018 (pp 105–106, encl 2) which reads:

Kindly take notice that it has come to our Client's attention that the said Abdul

Mirashaearizeam Bin Abdul Razak, deceased was carried in the said insured's vehicle whilst not being in pursuance of his contract of employment with our Client's Insured, one Gold Cold Logistics Sdn Bhd and/or their authorised driver and/or his employer. Therefore at all material times there no longer exist any insurable interest in the said insured vehicle as this falls squarely within the exceptions in the Insurance Policy taken out between our Insured and one one Gold Cold Logistics Sdn Bhd and the policy issued does not extend to cover your Client's claim against our Client's Insured. Furthermore, it is clear that pursuant to Sections 91(b)(aa) and/or Sections 91(b)(bb) of the Road Transport Act 1967, our Clients do not have to meet any judgment obtained by your Clients against our Client's Insured. Therefore our Clients are entitled to and shall avoid the said policy.

[19] Counsel for the plaintiff relied on s 91(1), (aa) and (bb) of the Road Transport Act 1987 to contend that there is no legal obligation on the part of D2 (the insured) to take out motor insurance policy to provide cover for passenger liability except in the situations stipulated in those subsections, which, according to the plaintiff, do not apply on the present facts.

[20] Section 91(1)(aa) and (bb) of the Road Transport Act 1987 read as:

91 Requirements in respect of policies

(1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which —

(a) is issued by a person who is an authorized insurer within the meaning of this Part; and

(b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn on a road:

Provided that such policy shall not be required to cover —

(aa) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(bb) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or

(cc) any contractual liability. (Emphasis added.)

THE DEPENDANTS' POSITION

[21] In opposing the plaintiff's application, counsel for the dependants submitted that the following facts are not seriously disputed:

(a) the deceased was a passenger who was required or obliged to travel in the insured motor lorry by reason of or pursuant to a contract of employment;

(b) D1 was the authorised driver of D2 and was driving the deceased upon the instructions of D2;

(c) D1 and the deceased were lawfully in the insured motor lorry, driven by D1 and belonging to D2;

(d) the deceased was an employee of GCT;

(e) D1 was the employee of D2;

(f) the deceased was not an employee of D1 or D2 but both the deceased and D1 did work for GCT and D2 respectively;

(g) the owners of GCT and D2 are the same; and

(h) the employees of both GCT and D2 perform work for the other interchangeably (see: pp 68–77, encl 2). Both the deceased and D1 were interchangeably in the course of employment for one another as the instructions came from the same employers (pp 75–78 paras 8, 16, 26–31 and p 79 para 26 exh VK3, encl 2).

[22] It was argued for the dependants that the deceased who was travelling in the insured motor lorry as an injured passenger as instructed by his employer (GCT), was within the scope of passenger cover per section 6(c) of the policy. This is elaborated further in the subsequent part of this judgment.

SECTION 6(c) OF THE POLICY

[23] In disclaiming liability for passenger cover, vis a vis the deceased, the plaintiff relied heavily on the policy wording (section 6(c)) which, according to their interpretation, does not cover the deceased, albeit, a passenger in the insured motor lorry at the material time. The relevant clause in the policy reads as follows:

> Section B of the policy: Liability to third parties reads:
>
> 1. We will indemnify You of Your authorised driver for the amount which You or Your authorised driver are legally liable to pay (including claimants' costs and expenses) for accident caused by or arising out of the use of Your Vehicle or in connection with the loading or unloading there from for:
>
> (a) Death or bodily injury to any person except those specifically excluded under Exceptions to Section B.
>
> Section B, Clause 6 under Exception to the policy, reads as follows:
>
> *We will NOT pay for*:

A

(a) ...;

(b) death or bodily injury to any person where such death or injury arises out of and in the course of the employment of such person by You or by Your authorised driver;

B

(c) death or bodily injury to any person being carried in or upon or entering or getting on to or alighting from Your Vehicle (*unless he/she* is required to be carried in or on Your Vehicle *by reason of or in pursuance of his/her contract of employment* with You and/or Your authorised driver and/of *his/her employer*). (Emphasis added.)

C

VANDYKE V FENDER

[24] The first task in the present context is to determine whether the deceased was travelling as a passenger in the insured motor lorry 'by reason of
D or in pursuance of his contract of employment'. In my view, the said phrase is closely related to the words 'arising out of and in the course of his employment'. The latter phrase was considered in *Vandyke v Fender (Sun Insurance Office Ltd, third party)* [1970] 2 QB 292 ('*Vandyke*'s case').

E

[25] In *Vandyke*'s case, Lord Denning provided useful guidance on the interpretation of the phrase, 'arising out of and in the course of his employment'. In that case, the injured party (Mr Vandyke) took a ride in a motorcar which was provided by his employer, Reddington Foundries Ltd
F ('Reddington').

[26] The motor car was not owned by Reddington, rather it was owned by an employee of Reddington who made the motorcar available for use by Reddington's employees. The motorcar was driven by Mr Vandyke's co-worker,
G Mr Fender.

[27] Of critical importance to the facts of that case is that Mr Vandyke was 'not obliged' to take a ride in the motorcar. He could have taken any other mode of transport. For instance, he could have taken the train to and from
H work, if he wanted to. Mr Fender drove the motorcar negligently and was involved in an accident, in which Mr Vandyke sustained injuries.

[28] The question was whether Mr Vandyke's injuries arose out of and in the course of his employment with Reddington. On the facts of that case, the
I Court of Appeal opined that Mr Vandyke's injuries *were not injuries which arose out of and in the course of his employment* with Reddington.

[29] The Court of Appeal reached that conclusion because they found that Mr Vandyke was *not obliged* to travel in that motorcar. It was the obligation or

compulsion which made all the difference. Hence, if Mr Vandyke was obliged to travel in the motorcar which was 'made available' by Reddington, then it may be concluded that Mr Vandyke's injuries arose out of and in the course of his employment with Reddington, but not otherwise. A

'*By reason of or in pursuance of his contract of employment*' B

[30] I turn now to the present case. I shall deal with the question whether the deceased died whilst he was being carried in or on the insured motor lorry by reason of or in pursuance of the deceased's contract of employment. Here, it cannot be denied that the deceased was under instructions from the CGT office to wait at the location of the first accident in Rawang as help was on the way. C

[31] Since the deceased was under 'instructions', he was clearly obliged to wait at the location of the first accident and was compelled to take a ride in the insured motor lorry, as that was the arrangement which had been made by the deceased's own employer, GCT. There is no evidence that D2 was averse to D1 picking up the deceased. Indeed, it appears quite clear from D1's police report that the deceased was lawfully travelling in the insured motor lorry as the 'pemandu kedua'. But that is not to say that the deceased was co-driver/substitute driver whilst travelling in the insured motor lorry. D E

[32] It is pertinent to note that although he was a lorry driver, the deceased was not at that point in time travelling in the insured motor lorry as D1 or D2's employee, and was not doing any work as a lorry driver and most certainly, was not a substitute driver for D1. F

[33] To round off on this factual point, I should say that it is not in dispute that when the second accident occurred, the deceased was travelling in the insured motor lorry as an 'injured person' and was being transported in the insured motor lorry (as per GCT's instructions) and heading towards his employer's office in Shah Alam. Thus, D1's description of the deceased in the police report is somewhat misleading as the deceased was not the second driver or co-driver in the insured motor lorry at the material time. He just happened to be a driver and was travelling passively as an injured person (passenger). G H

[34] But it is highly significant that his presence in the insured motor lorry was pursuant to his own employer's instructions. The deceased was therefore travelling as a passenger in the insured motor lorry and the journey that he took whilst as a passenger in the insured motor lorry was in the course of his employment, wherein he was being taken back to the office. I

[35] In fact, it would be quite right to say that the deceased was still on duty whilst he was travelling as a passenger in the insured motor lorry. But, of course, vis a vis the insured motor lorry, the deceased can be said to be a passive (injured) passenger on board the insured motor lorry.

[36] But looking at all the circumstances, I would say quite readily that the deceased was obliged to travel in the insured motor lorry and following the principle that is to be distilled from the *Vandyke*'s case, the deceased was therefore travelling in the course of his employment or more particularly travelling as a passenger, 'by reason of or in pursuance of his contract of employment', albeit, as an injured passenger in the insured motor lorry, which was not owned by his own employer, GCT.

[37] On that analysis, I am impelled to the view that since the deceased was travelling back to his office in the insured motor lorry as per instructions of his employer GCT, the fatal injuries which he sustained in the accident, were sustained by reason of or in pursuance of his contract of employment (with GCT).

[38] But this is just one part of the problem which arises in this case. The question is — whether the deceased, being a passenger with no employment nexus either the insured (D2) or its authorised driver (D1), can be said to be 'within' the scope of passenger cover as per section 6(c) of the policy.

SECTION 6(c) OF THE POLICY – INTERPRETATION

[39] Thus, having determined that the deceased was travelling in the insured motor lorry in the course of or in pursuance of his contract of employment, it is now necessary now to examine to the exclusionary wording of section 6(c) of the policy which states that there will be *no passenger cover unless* the passenger is required to be carried in the insured vehicle by reason of or in pursuance of his contract of employment with the insured and/or the insured's authorised driver and/or 'his/her employer'.

[40] On the basis of those exclusionary wordings, it was argued for the plaintiff that the policy wording is clear and unambiguous that there is no passenger liability unless the passenger was travelling in the insured vehicle by reason of or in pursuance of his contract of employment with the insured or with the insured's authorised driver or with the authorised driver's employer. Here, it was contended that the deceased had no employment nexus with D1 and/or D2. Thus, on that premise, it was contended that there is no passenger cover.

[41] But, on the other hand, it was argued for the dependants that section 6(c) of the policy is to be read as providing passenger cover for any passenger who was either travelling as a passenger in the course of his employment with the insured, or in the course of employment with the authorised driver, *or in the course of employment with the passenger's own employer*.

[42] And since the deceased was travelling in the course of his employment with GCT, it was contended for the dependants that the plaintiff is liable to provide passenger cover in respect of the dependency claim arising out of the death of the deceased. Counsel for the dependants argued that the words, 'his/her employer' appearing in section 6(c) of the policy, necessarily includes the deceased's own employment with GCT. Counsel for D7, D8 and D9 concurred with this interpretation.

[43] As an alternative, counsel for the dependants and counsel for D7, D8 and D9 argued that if the insurer's interpretation is to be accepted as one possible interpretation, then since there is arguably more than one interpretation to the policy, the policy wordings are therefore not free from interpretative ambiguity or difficulty. Thus, it was argued that there is at the very least, a doubt or ambiguity in the policy wordings, and as such the policy should be read *contra proferentum* against the plaintiff and in favour of the dependants.

[44] Counsel for the plaintiff argued that if section 6(c) of the policy is interpreted to mean that there is passenger cover in respect of a passenger who was travelling in the course of his employment with his own employer, then the outcome of the present case would be no different from the case of *Union Insurance Malaysia Sdn Bhd v Chan You Young* [1996] 2 MLJ 118; [1995] 4 CLJ 92 ('*Union Insurance* case') and *The People's Insurance Co (M) Bhd v Ting Tiew Kiong* [2007] 5 MLJ 624; [2007] 5 CLJ 225 ('*People's Insurance* case'), where it was held that based on the policy wordings in those two cases, passenger cover was established in respect of any person being carried in pursuance of a contract of employment with 'another employer'.

[45] In those cases, the courts held that passenger liability was established in respect of a passenger who was travelling in the course of employment albeit that the passenger was employed by a third party. Counsel for the plaintiff said that the policy wordings in the present case is different from the policy wording in the *Union Insurance* case and the *People's Insurance* case.

[46] Hence, counsel for the plaintiff argued that the difference in policy wording makes all the difference and that a different interpretation is to be given to the policy wordings as appearing in the instant case.

A UNION INSURANCE CASE

[47] In the *Union Insurance* case, the plaintiff was travelling to work and was being driven by her son. The motor car was owned by her husband. The motor car was involved with an accident. The plaintiff was injured. She sued her husband and her son and obtained judgment. She sought to enforce the judgment against the insurers of her husband's motor car. The insurers argued, inter alia, that the plaintiff was not covered by the policy. The court found for the plaintiff. The court also applied the *contra proferentum* rule and construed the policy against the insurer. The policy wording and the analysis by the court are to be found in the following passages of the judgment (see pp 96–97 of the judgment):

> I am told that I am breaking new ground as my decision, if I am with the wife, would prevent the insurance company from insisting that a passenger liability cover be taken to cover the wife who is being carried in the husband's (policy holder's) motorcar which was driven by her son as the authorised driver even though the policy is sufficiently worded to cover such an exigency.
>
> To ascertain and construe the extent of the coverage as provided under the policy, it is now appropriate to reproduce certain parts of the policy.
>
> Section II — Liability to third parties under clause I(a) of the policy read as follows:
>
> 1. The company will subject to the limits of liability indemnify the insured in the event of accident caused by or arising out of the use of the motor vehicle against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of:
>
> (a) death of or bodily injury to any person except where such death or injury arises out of and in the course of the employment of such person by the insured and excluding liability to any person being a member of the insured's household who is a passenger in the motor vehicle unless such person is being carried by reason of or in pursuance of a contract of employment.
>
> Clause 9 of the policy reads as follows:
>
> 9. The due observance and fulfillment of the terms of this policy in so far as they relate to anything to be done or not to be done by the insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the company to make any payment under this policy.
>
> Immediately following clause 9 of the policy appears the following words:
>
> *Endorsements*
>
> The following endorsements only apply to this policy when specifically mentioned in the schedule and are subject otherwise to the terms and conditions of this policy.
>
> Endorsement D reads as follows:
>
> *D. Exclusion of Passenger Liability.*

Notwithstanding anything contained herein to the contrary, it is hereby understood and agreed that the Company shall not be liable in respect of death of or bodily injury to any person (other that a passenger being carried by reason of or in pursuance of a contract of employment) being carried in or upon, or entering or getting on to or alighting from any vehicle in respect of which indemnity is granted under this Policy at the time of the occurrence of the event out of which any claim arises.

Now, s II clause 1(a) of the policy generally lays down the extent of coverage in respect of third party liability. The insurance company will indemnify the policy holder in respect of injuries suffered by a third party arising out of the use of the policy holder's motorcar subject to two exceptions:

(1) the third party was injured 'in the course of the employment of such person by the insured (policy holder)',

(2) the third party as a passenger 'was a member of the insured's household (policy holder).'

But the insurance company as an exception to number (2) above, will indemnify the policy holder in respect of the injuries suffered by a member of policy holder's household if the member of that household were, at the material time, a passenger 'by reason of or in pursuance of a contract of employment'.

The first part of s II clause I(a) of the policy as can be seen above speaks of an exception when the policy will not give coverage for death or bodily injury to a third party; and that exception will only arise in a situation 'where such death or bodily injury arises out of the employment by the insured (policy holder)'. But interestingly as far as the authorised driver is concerned, s II clause I(a) of the policy is silent and this must necessarily mean that the third party need not be employed by the authorised driver.'

PEOPLE'S INSURANCE

[48] The next case to be considered is the *People's Insurance* case. In the *People's Insurance* case, the plaintiff was travelling as a passenger in a motor car which was owned and driven by one Mr Toh Kie Hung ('*Mr Toh*'). The motor car swerved off the road and plunged into a ravine. The driver (Mr Toh) died and the plaintiff sustained serious injuries. The plaintiff sued the estate of Mr Toh and obtained judgment. The issues are defined in paras 6–8 of the Court of Appeal's judgment:

[6] The deceased's estate failed to pay the judgment sum. The plaintiff then filed this suit against the defendant, as the car was insured with the defendant. The defendant, an authorised insurer, had on 5 January 1995, issued insurance policy No SB94DY 001063/MPT/ROO ('the policy') to the deceased. The policy was to cover liability which may be incurred by the deceased in respect of death or bodily injury to any person caused by or arising from the use on the road of the car but excluded:

A (i) Liability arising from the death or bodily injury to any passenger being carried for hire or reward;

(ii) Liability arising from any death or bodily injury to any person where such death or injury arises out of and in the course of employment of such person by the deceased;

B (iii) Liability arising from any death or bodily injury to any person (*other than a passenger carried by reason of or in pursuance of contract of employment*) being carried in or upon or entering or getting onto or alighting from the car (Emphasis added.).

C [7] It is the plaintiff's case that the policy covered the plaintiff as he was 'a passenger carried by reason of or in pursuance of contract of employment'. The defendant denied any liability and alleged that the plaintiff was, at the time of the accident, a passenger in the car of the deceased being carried therein other than by reason of or in pursuance of a contract of employment.

D [8] Thus, the entire action therefore turned on a sole issue, namely whether the plaintiff was a passenger in the deceased's car by reason of or in pursuance of a contract of employment. If he was, the defendant is liable to satisfy the judgment obtained by the plaintiff against the estate of the deceased. If he was not, the defendant would not be liable.

E

[49] In the *People's Insurance* case, the plaintiff was travelling to a location in Stapang, Sibu to service a high pressure pump ('the pump') which has been sold by Scott & English to a customer in Stapang. The pump was out of order.

F

[50] The plaintiff was employed by Hicom United Leasing Sdn Bhd ('HICOM') as a mechanic. HICOM was in the business of selling high pressure pumps. The deceased was a salesman for Scott & English. The plaintiff was asked by his manager ('PW2') to go to Stapang, Sibu to check on the G pump. PW2 confirmed that he instructed the plaintiff to follow the deceased to Stapang to service the pump. The deceased wanted HICOM to carry out the servicing of the pump. PW2 said he 'instructed the plaintiff to travel in the deceased's motor car' because the deceased knew the location of the pump. Scott & English was the parent company of HICOM and the latter would H carry out servicing of equipment sold by Scott & English upon request by them. The Court of Appeal's conclusions appear in paras 13–15 of the judgment:

I [13] In this appeal, there are two aspects of the learned trial judge's decision which come under heavy criticism from the defendant. Firstly, the legal finding that the plaintiff need not work for the deceased's employer and travel in the car for the purpose. It suffice that he worked for some employer and travelled in the car pursuant to his contract of employment with that employer. Secondly, the factual finding that the plaintiff was in fact travelling pursuant to his contract of employment.

[14] The legal finding turn entirely on the meaning of the phase '... other than a passenger carried by reason of or in pursuance of contract of employment. 'As rightly pointed out by the learned trial judge, the law on passenger liability in respect of a policy of insurance having an exclusion clause with similar wordings as in the present case had been discussed in several cases. It is settled law that the contract of employment referred to in the clause is not confined to the employment of the insured. It is also applicable to any person being carried in pursuance of a contract of employment with another employer. (See: *Izzard v Universal Insurance & Ors* [1937] AC 733; *Tan Keng Hong & Anor v Fatimah binti Abdullah & Ors* [1974] 1 MLJ 156; *United Oriental Assurance Sdn Bhd v Lim Eng Yew* [1991] 3 CLJ 2418; [1991] 1 CLJ 484 and *Union Insurance (M) Sdn Bhd v Chan You Yuong* [1999] 2 CLJ 517). These cases clearly demonstrate that (the contract of employment referred to in the clause is not confined to the employment of the insured. It is possible for a passenger to come within this clause even if employed by a third party.

[15] After having correctly stated the law, the learned trial judge made the following factual findings:

On the day in question the plaintiff was being carried 'in pursuance of a contract of employment' because the evidence shows that it was a term of his contract of employment that whenever he was required to undertake jobs outside the office, the company as his employer would provide transportation for him to do so. With regard to the question whether the plaintiff was being so carried by *'reason of a contract of employment' the evidence shows that on the day in question the plaintiff was in the said vehicle as he had been instructed by his employer to travel as a passenger in the said vehicle and the company as his employer, was only able to give him that instruction by reason of there being the relationship of employer and employee between them by reason of contract of employment*'. (Emphasis added.)

[51] Upon applying the principles that may be distilled from the *Union Insurance* and *People's Insurance* case, to the facts of the present case, it cannot be denied that the deceased was working at that time when he was travelling in the insured motor lorry. Plainly, if not for the accident in Rawang, he would not have been picked up by the insured motor lorry. Furthermore, it is quite indisputable that after the first accident, the deceased travelled as a passenger in the insured motor lorry to be taken back to the GCT office in Shah Alam. Clearly, the deceased was not on a frolic of his own whilst he was travelling as a passenger in the insured motor lorry.

[52] It is important and imperative to note that in the present case, the deceased was 'instructed' to wait until he was rescued by the insured motor lorry and there was obviously a causal connection between the presence of the deceased in the insured motor lorry and his employment with GCT. In my view, there is a strong parallel between the facts of the instant case and the *People's Insurance* case. In both cases, the passenger was 'instructed' to travel in

the insured motor vehicle and the occasion was in the course of employment with his own employer.

[53] The crux of the issue at hand is the proper interpretation of the words 'his/her employer' which appears in section 6(c) of the policy. Counsel for the plaintiff says that 'his/her employer' is a reference to the authorised driver's employer and it cannot be a reference to the passenger's own employer. He said if the words 'his/her employer' are construed as referring to the passenger's 'own employer' then it would be superfluous because of the preceding words, 'in the course of or in pursuance of his/her contract of employment'.

[54] And so, on that premise it is contended for the plaintiff that the fact that the passenger was sitting in the vehicle in the course of his employment (with third party — GCT) and was travelling back to his own office but not having any employment nexus with the insured or the authorised driver, places the passenger in the 'excluded' category for purposes of section 6(c) of the policy.

[55] On the other hand, it is contended by the dependants that 'his/her employer' can also be a reference to the passenger's own employer (GCT) and that since those crucial words in the policy gives rise to or is capable of more than one meaning, there is ambiguity or doubt and the ambiguity or doubt should be construed *contra proferentum* against the plaintiff.

[56] In my view, if the plaintiff had intended that the words 'his/her employer' should only refer to the authorised driver's employer, then that should have been clearly and unambiguously stated in section 6(c) of the policy instead of leaving it to be open ended and ambiguous wherein those critical words lend themselves to at least two possible interpretations. In my view, the interpretation that is advanced by the dependants, ie 'his/her employer' can be a reference to the passenger's own employer, is quite a plausible and reasonable interpretation of the policy wording.

[57] In this regard, one must not lose sight of the fact that 'he/she' appears once and 'his/her' appears twice in that section. It reads, 'unless *he/she* is required to be carried in or on Your Vehicle by reason of or in pursuance of *his/her* contract of employment with You and/or Your authorised driver and/of *his/her* employer)'.

[58] In my view the reference to 'he/she' in the opening of the sentence which begins with 'unless' in the policy is a reference to the passenger (and no one else) and as such when it is tied up to the words, 'his/her' in the *middle* and at the *end* of that sentence, the meaning becomes crystal clear that 'his/her' in both places of that section is a reference to the passenger. As such, since the deceased was travelling by reason of or in pursuance of his contract of

employment with GCT, I am of the view that the deceased falls *within the ambit of the cover* and as such passenger cover for the deceased is accordingly established on the present facts.

[59] If the policy is to be construed *contra proferentum* then quite clearly on the present facts, the policy is to construed against the interpretation that is advanced by the plaintiff. Hence, I would interpret section 6(c) of the policy as providing passenger cover for the deceased. In this regard, the significant cases on *contra proferentum*, were duly analysed and referred to in the *Union Insurance* case and these are to be found in the following passages of the judgment (pp 101–102 of the judgment) which read as:

> Another rule of construction is that when the words in their ordinary meaning give rise to two distinct interpretations resulting in an ambiguity, the *contra proferentum* rule would apply. Lindley LJ explains the rule aptly in *Cornish v Accident Insurance Company Limited* [1889] 23 QBD 453 in the following words:
>
> > In a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions.
>
> To elaborate reference may be made to *English v Western* [1940] 2 KB 156 where the facts were that W was the owner of a policy which generally covered third party liabilities but denied indemnity for injuries of passengers that were 'members of the insured's household'. E who was the sister of W was injured in an accident while being driven by W. The insurance company denied liability claiming she was not covered by the policy. The Court held that due to the ambiguity inherent in that phrase, the *contra proferentum* rule applied. It was construed that since the brother was not the head of the sister's family, she was not a member of her brother's household. She was held to be covered by the policy. Clauson LJ delivered the decision of the Court and in erudite terms this was what he said:
>
> > A man may be related to a household in two ways. He may be a member of the household or be may be the head of the household ... In other words, in my judgment, either of the two competing meanings of the phrase 'a member of the assured's household' is possible and natural, and accordingly, there is in the truest sense an ambiguity in the phrase. There is no doubt that, if the phrase as used in the policy is in this sense ambiguous, the meaning must be chosen which is less favourable to the underwriters who have put forward the policy.
>
> Back home in Malaysia, the Federal Court in the case of *Malaysia National Insurance Sdn Bhd v Abdul Aziz Bin Mohamed Daud* [1978] 1 LNS 117; [1979] 2 MLJ 29, applied the *contra proferentum* rule in an insurance policy in favour of the assured. In that case, briefly, there was a dispute as to the interpretation of a provision in a policy of insurance. The Federal Court pointed out that the general rules of interpretation apply to insurance policies as in any other written document. The Federal Court held that:
>
> > It also seems to me that as between the assured and the insurers, the exception clause in the proviso, on the ordinary principles of construction has, as far as possible, to be read against the insurance company, that is to say if there is a

> doubt as to its extent and the question were to arise as to the liability of the insurers, the construction most favourable to the assured must be given to him.

Mohamed Azmi J (now FCJ) adopted the same stand in *Central Lorry Service Co Sdn Bhd v The American Insurance Co* [1980] 1 LNS 175; [1981] 2 MLJ 40 when His Lordship said:

> In my view, there is only doubt and ambiguity in the clause as to whether the policy covers any accident to the vehicle or is merely confined to accidents caused by the vehicle involuntarily leaving the road or by break-down of bridges. In construing insurance policies, the *contra proferentum* rule should apply if there is ambiguity or doubt as to the extent of the policy. Since the policy is prepared by the insurance company, the doubt and the ambiguity should be construed in favour of the insured, namely, the plaintiff in this case. In the event, I hold that the policy covers all accidents to the vehicle and that the two events described in the clause are examples and not exhaustive. The plaintiff's claim is therefore covered by the Inland Transport clause in the policy.

In almost the same vein Lord Brightman in the Privy Council's case of *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85; [1983] CLJ 7 Rep; [1983] 2 CLJ 55 said:

> There is a principle of construction that if a document inter parties contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution.

LONPAC INSURANCE BHD

[60] For completeness, I should mention that counsel for the seventh, eighth and ninth defendants drew my attention to the case of *Lonpac Insurance Bhd v Ridzuan bin Rahim* (Civil Appeal No 12 BNCVC-18–03 of 2015) (unreported), Ipoh High Court ('*Lonpac* case') (per Noorin bt Badaruddin JC — as she then was) ('the learned JC') (affirmed on appeal by the Court of Appeal on 23 February, 2016 via Court of Appeal Malaysian Civil Appeal NobA-04(NCVC)(W)-226–08 of 2015). In that case, the dependants of one Jiva Saltian A/L Govindasamy ('the deceased') sued Ridzuan bin Rahim ('Ridzuan') and Winstar Enterprise Sdn Bhd ('Winstar'). The deceased and Ridzuan were employees of Winstar.

[61] Ridzuan was the driver of motor lorry BKV 9173 ('the insured motor lorry'). The motor lorry was owned by Winstar. The deceased travelled in the motor lorry as 'co-driver/substitute driver'. The insured motor lorry collided with another motor lorry bearing registration No PET 9299. The deceased sustained injuries and died as a result of the accident. The deceased was employed by Winstar as a driver. The insurer, Lonpac Insurance Bhd ('the appellant') applied under s 96(3) of the Road Transport Act 1987 for a declaration that the policy of insurance for the insured motor lorry was void

and unenforceable as the deceased was an employee of the insured and was not covered by the policy.

[62] The following passages from the judgment of the learned JC were referred to:

> [9] The appellant contended that the said policy issued to the second respondent indicated that the third, fourth and fifth respondents claim was not covered under the said policy as the deceased was in the said m/lorry at all material time as a co-driver/substituted driver. The appellant relied on the provision in the said policy in particular the exception in clause (b) of the Exceptions To Section B (page 17 of the Appeal Record). Exceptions To Section B of the policy (page 17 of the Appeal Record) are worded as follows:
>
> EXCEPTIONS TO SECTION B
>
> We will NOT PAY for:
>
> (a) death or bodily injury to any person where such death or injury arises out of and in the course of the employment of such person by You or by Your authorised driver;
>
> (b) *death or bodily injury to any person where such death or injury arises out of and in the course of the employment of such person by You or by Your authorised driver*;
>
> (c) death or bodily injury to any person being carried in or upon or entering or getting on to or alighting from Your Vehicle (unless he/she is required to be carried in or on Your Vehicle *by reason of or in pursuance of his/her contract of employment* with You and/or Your authorised driver and/of *his/her employer*);
>
> (d) damage to property belonging to or in the custody of or control or held in trust by You and/or Your authorised driver and/or any member of Your and/or Your authorised driver's household.
>
> (e) damage to any bridge, weigh bridge or viaduct or to any road or anything beneath by vibration or by the weight of Your Vehicle or of the load carried by Your Vehicle.
>
> (f) damage to property caused by or arising out of the explosion of a boiler forming part of attached to or on Your Vehicle.
>
> (g) death or bodily injury caused by or arising out of the explosion of a boiler forming part of attached to or on Your Vehicle except so far as is necessary to meet the requirements of the legislation;
>
> (h) any claims brought against any person in any country in courts outside Malaysia, the Republic of Singapore or Negara Brunei Darussalam;
>
> (i) all legal costs and expenses which are not incurred in our recoverable in Malaysia, the Republic of Singapore and Negara Brunei Darussalam.'

A [10] The appellant further contended that as the deceased was in the said m/lorry at all material time as co-driver/substituted driver and was employed by the second respondent, his death arose out of and in the course of his employment. Thus, the said policy issued by the appellant did not cover the deceased and that it (the said policy) was void and unenforceable.

B ...

[13] The third, fourth and fifth respondents centred their argument around the issues that if consideration was given to the argument that the said policy issued also covered the first respondent, since the deceased was not an employee of the 1st respondent, the deceased was travelling in the insured vehicle ie the said m/lorry as C a passenger 'in pursuant to a contract of employment'.

...

[19] It was admitted by the third, fourth and fifth respondents that the deceased was a co-driver/substituted driver of the m/lorry on the day of the accident. The third, D fourth and fifth respondents in their Amended Statement of Claim in Teluk Intan Sessions Court vide summons No A53KJ-92-7/2014 pleaded as follows:-

> ... 2. Pada masa-masa material, si mati adalah pemandu gentian dan adalah seorang penumpang yang dikehendaki dibawa di dalam atau di atas lori BKV E 9173 dengan sebab atau bagi tujuan melaksanakan pekerjaannya ...

[20] Premised in the undisputed facts stated above, this court found that the deceased's death arose out of and in the course of his employment and whilst he was executing his duties as a co-driver. This court is further satisfied that the deceased was not in the said m/lorry as a passenger 'in pursuant to a contract of employment' F as the facts revealed, he was not heading towards or returning from work. He was in actual fact, working at the material time.

...

[24] In light of the fact that the deceased was in the m/lorry BKV 9173 at all G material time as co-driver, it is therefore apparent that the death of the deceased falls within the scope of Clause (b) Exception to Section B which prescribed that the insurer will not pay for the death or bodily injury to any person where such death or injury arises out of and in the course of the employment of such person by the insured 'OR' his/her authorised driver. The Exception clause is allowed under the H provision of s 91(1)(b)(aa) which provides:

> 91 Requirements in respect of policies
>
> (1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which—
>
> I (a) is issued by a person who is an authorised insurer within the meaning of this Part; and
>
> (b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused

by or arising out of the use of the motor vehicle or land implement drawn on a road: A

Provided that such policy shall not be required to cover —

(aa) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or B

(bb) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or C

(cc) any contractual liability.

[25] The wordings in the exemption clause are also disjunctive. The wordings in clause (b) Exception to Section B states '... You or Your Authorised Driver...' *The fact that the deceased was in the m/lorry as employee of the second respondent and his death arose out of and in the course of his employment (as a co/substituted driver) disqualify him from resorting to the next category of person i.e. a non-employee to the 1st respondent and therefore a passenger in the m/lorry.* The deceased could not be said to be a passenger in the said m/lorry as he was obviously executing his duties as the second respondent's employee. From the undisputed facts again, neither was the deceased in the said m/lorry 'pursuant to a contract of employment'. (Emphasis added.) D E

[63] I am view that the outcome or the findings or conclusions of the *Lonpac* case has no impact on the present case. In that case, the deceased was an employee of the insured and was a co-driver/substitute driver in the insured motor lorry. F

[64] In the *Lonpac* case, the deceased fell within exception (b) of Part B of the policy as his death arose out of and in course of his employment with the insured. He was not a passenger and was clearly excluded from passenger cover under the policy. The court held that having established that he was 'excluded' because he was the insured's employee, there was no scope for any further argument to suggest that the deceased was travelling in the insured motor lorry as a 'passenger'. G H

[65] However, in the present case, the deceased was not travelling in the insured motor lorry as a co-driver or substitute driver. He was an injured person who was being transported (as a passenger) in the insured motor lorry and was being taken back to his employer's office in Shah Alam. All of this was at the behest or instructions of the deceased's own employer, GCT. As such, the conclusions that I have reached in this case are in no way affected by the *Lonpac* case. I

A SAME OUTCOME AS UNION INSURANCE AND PEOPLE'S INSURANCE

[66] I am mindful of and very much alive to the plaintiff's arguments that in *Union Insurance* case and *People Insurance* case, the employer was not identified per the policy wording, whereas, in the present case, the policy wording are differently worded and has somewhat defined the scope of the passenger's employment to either the insured, the authorised driver or perhaps the authorised driver's employer.

[67] According to the plaintiff, section 6(c) of the policy is to be read as providing passenger cover only for a passenger who is travelling in the insured vehicle in the course of employment under a contract of employment with the insured, or a contract of employment with the authorised driver or a contract of employment with the authorised driver's employer. In the latter two situations, the passenger would, respectively be an employee of the authorised driver or a co-worker of the authorised driver. In the present case, the deceased was employed by a third party (GCT). Hence, it is contended for the plaintiff that the deceased fell outside the scope of passenger cover as per the policy.

[68] I am unable to accept that the plaintiff's interpretation. As stated earlier, the word 'his/her employer' is clearly a reference to passenger's own employer (GCT). Consequently, I hold that the word 'his/her employer' is not controversial and there is no ambiguity. At any rate, even if the plaintiff's interpretation is to be accepted, it will at best, give rise to an alternative interpretation and therefore leads to an ambiguity or doubt as to the proper interpretation to the policy and as such the policy must be construed *contra proferentum* against the plaintiff.

[69] It may well have been the intention of the plaintiff to put in place different wordings as per section 6(c) of the policy so as to avoid the same outcome as in the *Union* case and *People's Insurance* case. However, if it was the intention of the plaintiff that post the *Union* case and the *People's Insurance* case, the scope of employment by the use of the words 'his/her employer' in section 6(c) of the policy was to be restricted or confined to the employer of the authorised driver, and not to any other third party employer, then instead of utilising general words such as 'his/her employer', the policy should have used specific words such as 'the authorised driver's employer'.

[70] Had that been done, then there would be no ambiguity. As presently worded, I am not inclined to agree with the plaintiff's argument that since the policy wordings here are different from the policy wording in the *Union Insurance* case and *People's Insurance* case, therefore the court should lean towards an interpretation that does not produce a similar result. I do not think

that the courts should be concerned with the consequences of its interpretation one way or the other. All that the court can and must do is to interpret the policy in accordance with the relevant principles of law pertaining to the subject of interpretation, including the interpretation rule of *contra proferentum*.

OUTCOME

[71] In the result, for the reasons as discussed above, I am of the view that the deceased was travelling in the insured motor lorry by reason of or in pursuance of a contract of employment with GCT, and was within the policy wording for purposes of passenger cover and the plaintiff is accordingly liable to provide passenger cover to the deceased. The originating summons is hereby dismissed. The plaintiff is to pay costs of RM3,000 (subject to 4% allocatur) to the third to sixth defendants and RM3,000 (subject to 4% allocatur) to seventh to ninth defendants.

Order accordingly.

Originating summons dismissed.

Reported by Nabilah Syahida Abdullah Salleh